

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2013 MSPB 37

Docket No. PH-0841-10-0307-M-1

**Kelly L. Stephenson,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

May 16, 2013

Robert R. McGill, Esquire, Walkersville, Maryland, for the appellant.

Kristine Prentice, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 This case is before the Board on remand from the Court of Appeals for the Federal Circuit. *Stephenson v. Office of Personnel Management*, [705 F.3d 1323](#) (Fed. Cir. 2013). For the reasons set forth below, we REMAND the case to the Office of Personnel Management (OPM) for recalculation of the appellant's Federal Employees' Retirement System (FERS) disability retirement annuity.¹

¹ Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. While the court's decision post-dates the

¶2 The appellant began receiving a FERS disability retirement annuity on May 4, 2005. Initial Appeal File (IAF), Tab 3, Subtab 2a; *see id.*, Subtab 2d at 10. He also applied for Social Security Administration (SSA) disability benefits and SSA determined that he was entitled to receive such benefits beginning July 2005. *Id.*, Subtab 2d at 9. OPM reduced the appellant's FERS disability annuity to account for the monthly SSA disability benefits to which he was entitled. *Id.* at 7; *see* [5 U.S.C. § 8452](#)(a)(2)(A); 42 U.S.C. § 423.

¶3 In May 2009, the appellant completed a 9-month trial work period in which he demonstrated his ability to work. IAF, Tab 3, Subtab 2d at 1; *see* [42 U.S.C. §§ 422](#), 423. Thereafter SSA notified him that, because he was able to perform substantial work, it had determined that his disability had ended, and that he was not entitled to SSA disability benefits beginning September 2009. IAF, Tab 3, Subtab 2d at 1. Because the appellant stopped receiving SSA disability benefits, he requested that OPM terminate the offset in his FERS annuity. *Id.* at 3. OPM denied his request, stating in its reconsideration decision that, although his employment resulted in the suspension of his SSA disability benefits, he still retained eligibility because he was still deemed disabled, that his annuity was reduced because he was eligible to receive benefits from SSA, and that the law requires the reduction in his annuity to remain based on his continued entitlement to SSA disability benefits. IAF, Tab 3, Subtab 2a.

¶4 On appeal, the administrative judge affirmed OPM's decision. IAF, Tab 11. On the appellant's petition for review, a majority of the Board agreed with the administrative judge, finding that the appellant remained entitled to SSA disability benefits during the 36-month period following his trial work period,

issuance of the new regulations, the proceedings before the Board all occurred prior to the implementation of the new regulations. Even if we considered this matter under the previous version of the Board's regulations, the outcome would be the same.

and that, therefore, OPM properly reduced his annuity.² *Stephenson v. Office of Personnel Management*, MSPB Docket No. PH-0841-10-0307-I-1, Final Order at 3-6 (Dec. 13, 2011).

¶5 On the appellant’s petition for review to the Court of Appeals for the Federal Circuit, the court found that, under the plain language of section 223 of the Social Security Act (codified at [42 U.S.C. § 423](#)), the appellant was not “entitled” to SSA disability benefits during the period in question, and that no offset should have been made for SSA disability benefits he did not receive. *Stephenson*, 705 F.3d at 1328. Specifically, the court found that “[b]y its express terms, section 223 of the Social Security Act prohibited SSA from paying [the appellant] SSA disability benefits for any month during the period at issue – between September 2009 and May 2012 – in which he performed ‘substantial gainful activity,’ even though he had previously applied for, and been granted, SSA disability benefits.” *Id.* Therefore, the court found, under SSA’s definition, the appellant was not “entitled” to SSA disability benefits for any month in which he performed substantial gainful activity. *Id.* Concluding that OPM erred in denying the appellant’s request to recalculate his FERS disability retirement annuity to account for the cessation of his monthly SSA disability benefits, the court reversed the Board’s decision and remanded the case for further proceedings consistent with its opinion. *Id.* at 1331. Accordingly, we hereby remand the matter to OPM for issuance of a new reconsideration decision consistent with the court’s order and this decision.

ORDER

¶6 On remand, OPM shall issue a new reconsideration decision, recalculating the appellant’s FERS disability retirement annuity to account for the cessation of his monthly SSA disability benefits. OPM shall issue the new reconsideration

² Vice Chairman Anne Wagner dissented from the majority opinion.

decision within 60 days from the date of this Opinion and Order and shall advise the appellant of his right to appeal to the Board if he disagrees with that new decision. *See, e.g., Nichol v. Office of Personnel Management*, [105 M.S.P.R. 201](#), ¶ 21 (2007).

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.